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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1469

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON HARRIS, DON SMITH, GLENN DESPAIN, J. ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska,

Appellants,

vs.

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE,

Appellees.

Appeal from the United States District Court for the District of Alaska

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

ARGUMENT

Appellees assert that the decision of the three judge district court that the Alaska statutory and regula-

tory provisions violated Article VIII Section 15 of the Alaska Constitution is so clearly correct as to present no substantial question for review by the United States Supreme Court. This assertion by appellees is incorrect.

Article VIII Section 15 of the Alaska Constitution provides:

> NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Appellants, on page 22 of their jurisdictional statement, pointed out that in granting summary judgment the court based its decision largely upon a fact not in evidence before it. The court stated:

> Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they may wish to hire. [Appendix to Jurisdictional Statement, page vii].

The court also stated in its opinion:

> Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. [Appendix to Jurisdictional Statement, page vii].

There was no evidence properly before the court upon which the court could reach that conclusion. The

court thereby interpreted the effect of the statute under attack, AS 16.05.536, upon facts not in evidence. The clear, unambiguous wording of the relevant portions of the statute that a salmon net gear license may be issued to a person who "(2) has, for any three years, held a commercial fishing license and while so licensed actually engaged in commercial fishing in that specific area" does not compel the conclusion reached by the lower court. Thus, the conclusion of that court that the statute creates an exclusive right of fishery in violation of Article VIII Section 15 of the Alaska Constitution is clearly erroneous. The basis upon which the court reached its conclusion is not in accordance with F.R.C.P. 56 (e).

In support of the position that the court correctly ruled in respect to their motion for summary judgment appellees cite a letter from then Attorney General, Edgar Paul Boyko, to the Commissioner of Fish and Game (Appendix C, Appellees' Motion to Dismiss and/or Affirm). The conclusion of that letter is that the regulations then under consideration were unconstitutional. Appellees assert that the letter—

> [F]ound unconstitutional proposed 1968 regulations held unconstitutional in the opinion being appealed in this case. [Appellees' Brief, page 5].

That broad statement is highly inaccurate. The letter was directed to proposed regulations of the Alaska Department of Fish and Game which never became final. Moreover, subparagraph 2 of the letter (page A-18 Appendix to Appellees' Brief) states:

> We believe that Section 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet constitutional requirements.

On the basis of this letter, changes were incorporated in Section 102.09 of the 1968 Alaska Commercial Fishing Regulations. The changes provided a system of new entry. Based upon the changes, the Attorney General of the State of Alaska, in a letter dated February 16, 1968, attached hereto in Appendix A, approved Section 102.09 of the 1968 Commercial Fishing Regulations.

The clear effect of the statutory and regulatory provisions is to permit orderly new entry into the Alaska Salmon Net Gear Fishery. In the light of such new entry, there is no exclusive right of fishery in violation of Article VIII Section 15 of the Alaska Constitution. The decision of the three judge district court is not, therefore, clearly correct. Substantial questions in respect to the regulatory and statutory provisions in the light of the Alaska Constitutional provisions are presented for review by this court.

Appellees rely on the case of *Brown v. Anderson,* 202 F.Supp. 96 (D. Alaska 1962) to support their assertion that there is an actual case in controversy between the parties. It is only necessary to note that the decision of the three judge court in that case has never been reviewed by an appellate court. The case simply indicates that courts are prone to repeat their error. The lower court decision in *Brown v. Ander-*

son, supra, is no more binding on the Supreme Court than is the court's decision in the case at bar. On the basis of the facts involved in this case, there is a substantial question as to whether there is an actual case in controversy.

That the application of the doctrine of abstention to this case raises substantial issues for this court is made clear by this court's statement in *Railroad Comm'n. of Texas v. Pullman Co.,* 312 U.S. 496 (1941). One assertion in that case was that a state regulation violated state law. The United States Supreme Court ordered the Federal court to retain jurisdiction pending the determination of issues involving state law by the state court. The Supreme Court stated:

> The lower [federal district] court did deny that the Texas statutes sustained the commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by state adjudication. The

> reign of law is hardly promoted if an unnecessary ruling of federal court is thus supplanted by a controlling decision of a state court. . . .
>
> . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the final authority of a state court to interpret doubtful regulatory laws of the state. (312 U.S. at pages 500-501).

The same comments would apply to the case at bar.

CONCLUSION

On the basis of the foregoing it is clear that the issues raised by this appeal are substantial notwithstanding appellees' assertion to the contrary. The appellants therefore urge that this court assume jurisdiction of this appeal in order that the important issues may be briefed on the merits.

Dated, July 17, 1969.

G. KENT EDWARDS,
Attorney General, State of Alaska,
By ROBERT L. HARTIG,
Assistant Attorney General,
Attorneys for Appellants.

(Appendix A Follows)

Appendix A

February 16, 1968

The Honorable August F. Reetz
Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Proposed Section 102.09 of the
1968 Commercial Fishing
Regulations

Dear Commission Reetz:

Pursuant to AS 44.62.060 our office has reviewed the above referenced regulation and have concluded that it is legally valid, clear in content and proper in form.

By copy of this letter we are also advising the Secretary of State of our belief that the notice of publication requirements of the Administrative Procedure Act have been complied with in promulgating said regulation even though the regulation was a product of two separate Board meetings, only one of which was designated in the public notice regarding said regulation.

Sincerely,
Edgar Paul Boyko
Attorney General
By G. Kent Edwards
Deputy Attorney General

EPK:GKE:rw
cc: Secretary of State